

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
LEON F. AND ISABELLA O. BURKHARDT	:	DETERMINATION DTA NO. 808432
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1978 through 1988.	:	

Petitioners, Leon F. and Isabella O. Burkhardt, Route 1, Box 87, Moneta, Virginia 24121-9205, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1978 through 1988.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel) brought a motion dated January 10, 1996 and returnable March 28, 1996 for an order directing the entry of summary determination in favor of the Division of Taxation on the ground that no material and triable issue of fact is presented and the Division of Taxation is entitled to a determination in its favor as a matter of law. Petitioners did not respond.

Upon review of all the papers filed in connection with this motion, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. Leon F. and Isabella O. Burkhardt (hereinafter "petitioners") were the recipients of a Federal pension during each of the years 1978 through 1988, inclusive. On their New York returns for the aforesaid years they reported the pension income as taxable for New York State purposes. Petitioners' personal income tax returns for the years at issue were all timely filed; that is, they were all filed on or before April 15 of the following year.

2. In April 1989, the Division of Taxation ("Division") issued statements in various newspaper articles throughout New York State suggesting that taxpayers might wish to file timely protective refund claims for years where the statute of limitations had yet to expire while litigation of the issue of the taxability of Federal pensions was pending. For the most part, the year 1985 was addressed in these articles since the statute of limitations for filing refund claims for 1985 was about to expire.

3. In March 1990, petitioners filed a formal claim for refund for the years 1978 through 1988.

4. On November 6, 1989, the Division issued a Technical Services Bureau memorandum to the public which also informed taxpayers of their rights to file protective refund claims during this period. This memorandum states as follows:

"Taxation of Federal Pensions

"Chapter 664 of the Laws of 1989 amended the Tax Law and the Administrative Code of the City of New York to exempt federal pensions from New York State personal income tax, New York City personal income tax and the Yonkers income tax surcharge. This legislation was enacted in response to the United States Supreme Court decision in Paul S. Davis v. Michigan Department of Treasury, which held that states such as New York that exempt pensions of their own employees from income taxes must provide a similar exemption to employees of the federal government. The new exemption also applies to the New York State and New York City separate taxes on lump sum distributions.

"Chapter 664 amended sections 612(c)(3) of the Tax Law and 11-1712(c)(3) of the Administrative Code to allow a new subtraction from federal adjusted gross income to arrive at New York adjusted gross income. The subtraction is for the amount of pensions paid to officers or employees, or their beneficiaries, of the United States, any territory or possession or political subdivision of such territory or possession, the District of Columbia, or any agency or instrumentality of any of the foregoing (including the military), to the extent the pension payments were included in gross income for federal income tax purposes.

"The new law applies to federal pension payments received on or after January 1, 1989. Therefore, New York State will not issue refunds for prior years even where the statute of limitations has not expired.

"However, two pending New York Supreme Court cases may result in the state being required to issue refunds for prior years. Pending the outcome of this litigation, taxpayers have the right to file protective claims for refund for all open years on Form IT-113X. If a taxpayer's refund claim is denied, the taxpayer must file a petition with the Commissioner of Taxation and Finance in order to preserve his or her refund rights" (emphasis added).

5. On June 14, 1990, the Division of Taxation issued to petitioners a Notice of Disallowance in full for the years 1978 through 1988. The basis for such disallowance was that, in response to the Davis case, the New York Tax Law was changed and Federal pension benefits received in taxable years beginning on or after January 1, 1989 were not taxable. However, New York State was not issuing refunds for taxes paid on Federal pension benefits for years prior to 1989.

6. Following the United States Supreme Court's decision in Harper v. Virginia Dept. of Taxation, (509 US ___, 125 L Ed 2d 74), petitioners were paid refunds for the years 1986 through 1988. The Division paid the refunds because petitioners' claim for refund was timely filed for these years and the Harper decision dictated that the Davis decision be applied retroactively. The refunds for these three years were paid on September 30, 1994. Therefore, these three years are no longer at issue.

CONCLUSIONS OF LAW

A. On March 28, 1989, the United States Supreme Court issued Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891). Davis held that state income tax schemes which provide for inconsistent treatment of State and Federal retirement benefits violate 4 USC § 111, which protects Federal employees from discriminatory state taxation, and further held that such schemes are unconstitutional under the doctrine of intergovernmental tax immunity.

B. At the time of the issuance of Davis, the Tax Law provided for similarly discriminatory treatment of Federal and State retirement benefits. Specifically, Tax Law former § 612(c)(3) provided that pensions to officers and employees of New York State and its political subdivisions were excluded from New York State income tax. At the same time, the Tax Law contained no similar provision for pensions to Federal retirees; such pensions were therefore subject to tax. In an apparent effort to remedy this situation, the Legislature amended the Tax Law, effective January 1, 1989, to exclude Federal pensions from New York income tax (see, L 1989, ch 664; Tax Law § 612[c][3][ii]) and thereby place both State and Federal retirees on equal footing. This remedy, however, was explicitly prospective and the Davis decision did not

address the issue of retroactive application of its holding. At the time, the Division of Taxation took the position that Davis applied prospectively only and therefore denied refunds of tax on Federal pensions for years prior to 1989 even where timely refund claims were filed. Federal pensioners disagreed and commenced litigation in New York and throughout the country (see, e.g., Duffy v. Wetzler 148 Misc 2d 459, 555 NYS2d 543, mod 174 AD2d 253, 579 NYS2d 684, appeal dismissed 80 NY2d 890, 587 NYS2d 900, revd ___ US ___, 125 L Ed 2d 716, on remand 207 AD2d 375, 616 NYS2d 48, lv denied 84 NY2d 838, 617 NYS2d 129, cert denied ___ US ___, 130 L Ed 2d 673).

C. The issue of the retroactive application of the Davis holding was resolved in the affirmative in Harper v. Virginia Dept. of Taxation (*supra*). In that case, while the Court held that the rule announced in Davis was to be given full retroactive effect, it did not provide relief to the petitioners therein. Rather, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (496 US 18, 110 L Ed 2d 17), the Court held that a state was free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (Harper v. Virginia Dept. of Taxation, *supra*, 125 L Ed 2d at 88-89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a clear and certain remedy for any erroneous or unlawful tax collection (see, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, *supra*, at 39, 110 L Ed 2d at 37-38).

D. Harper thus requires that Davis be given retroactive application. Accordingly, applying Davis to the instant matter, it is clear that petitioners "overpaid" their income tax for the years at issue within the meaning of Tax Law § 687(a) (see, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119, 120).

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in relevant part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . ."

F. The dispute in the instant matter involves the time limitations portion of Tax Law § 687(a). Pursuant to this section, petitioners were required to file refund claims within three years from the date of filing of their returns for the years at issue. Petitioners have not raised any issues regarding any other part of section 687(a). Accordingly, the question presented becomes whether the limitations period set forth in Tax Law § 687(a), as applied in this instance, complies with Federal due process requirements under the standard enunciated in McKesson.

G. In McKesson, the Court discussed various constitutionally permissible procedural requirements available to a state to protect its interest in maintaining fiscal stability:

"The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, *supra*, at 45, 110 L Ed 2d at 41; emphasis supplied.)

H. Clearly, the three-year statute of limitations at issue herein falls well within the range of permissible procedural protections discussed in McKesson. Accordingly, the relevant limitation periods have been properly applied in the present matter.

I. Apart from the due process analysis utilized in the McKesson and Davis line of cases, the Appellate Division has indicated that the limitations provisions of Tax Law § 687(a) operate to bar refund claims filed beyond the statutory period even where, as here, the tax in question is subsequently determined to be unconstitutional (*see*, Fiduciary Trust Co. v. State Tax Commn., 120 AD2d 848, 502 NYS2d 119, *supra*). The court in Fiduciary Trust Co. relied on the principle

that there can be no recovery of taxes voluntarily paid, without protest, under a mistake of law (id., 502 NYS2d at 120). In this case, there is no evidentiary basis nor is there any legal authority supporting the proposition that petitioners' inclusion of Federal pension income on their returns and payments of tax thereon for the years at issue represents "payments under demand" rather than "erroneous overpayments by petitioners". Simply put, petitioners' payments of tax on Federal pension income per their 1978 through 1985 returns represents voluntary payments under mistake of law with no subsequent timely protests. Fiduciary Trust Co. thus provides additional authority against petitioners' position herein.

J. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

K. In the instant matter there are no material issues of fact. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

L. The petition of Leon F. and Isabella O. Burkhardt is denied, except as indicated in Finding of Fact "6", and the Division of Taxation's denial of petitioners' refund claim is sustained, except for the years 1986, 1987 and 1988.

DATED: Troy, New York
May 9, 1996

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE